

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. 85617**

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**66, INC.,**

**Plaintiff-Appellant/Cross-Respondent,**

**v.**

**CRESTWOOD COMMONS REDEVELOPMENT CORPORATION,  
SCHNUCK MARKETS, INC., and HYCEL PARTNERS, III, L.P.**

**Defendants-Respondents/Cross-Appellants.**

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**On Appeal from the Circuit Court of St. Louis County  
Division 13  
Hon. Barbara Wallace**

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**SUBSTITUTE BRIEF FOR RESPONDENTS/CROSS-APPELLANTS**

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## **JURISDICTIONAL STATEMENT**

This case presents cross-appeals from a final judgment entered in a civil case filed in St. Louis County, Missouri. On April 9, 2002, the Honorable Barbara Wallace entered judgment in favor of plaintiff 66, Inc. for \$392,612 after a one-day bench trial on plaintiff's claim for damages allegedly incurred as a result of the abandonment of a condemnation action by defendant Crestwood Commons Redevelopment Corporation (L.F. 242-47). The case was before the circuit court for trial on damages only after remand by this Court in *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32 (Mo. banc 1999). Previously, on January 10, 2001, Judge Wallace had granted partial summary judgment in favor of defendants with regard to certain items of damages claimed by plaintiff (L.F. 235-41).

Plaintiff filed a Notice of Appeal on April 19, 2002, seeking review of both the summary judgment ruling and the final judgment entered on April 9, 2002 (L.F. 248). Defendants filed their cross-appeal on May 17, 2002 (L.F. 262). Following the issuance of an opinion by the Court of Appeals, Eastern District, on August 19, 2003, and a denial of rehearing or transfer by that court on October 2, 2003, this Court granted plaintiff's application for transfer on November 25, 2003.

## **STATEMENT OF FACTS**

Respondents submit their own Statement of Facts because, contrary to Rule 84.04(c), the Statement contained in appellant’s brief is not a concise and fair statement of the facts related to the questions before this Court, but is largely based on unsupportable legal arguments and certain facts not supported by the record and rejected by the trial court.

### **Parties**

This is yet another appeal in litigation which has spanned almost 15 years arising out of efforts by the City of Crestwood, Missouri, (the “City”) to redevelop a parcel of property located on Watson Road in St. Louis County, Missouri (the “Property”) (L.F. 11-12).<sup>1/</sup> Plaintiff-Appellant 66, Inc. (“66” or “plaintiff”), formerly known as 66 Drive-In, Inc., was originally a tenant under a long-term lease of the Property, on which it operated a drive-in theatre from 1946 to 1993 (L.F. 87, 146-48). In 1988, after the City passed a blighting ordinance in preparation for redevelopment and

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<sup>1/</sup> The Crestwood Commons saga has already resulted in four reported opinions which detail many of the underlying facts of this case. They are *Crestwood Commons Redev. Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 905 (Mo. App. 1991) (“CC I”); *Crestwood Commons Redev. Corp. v. 66 Drive-In, Inc.*, 882 S.W.2d 319 (Mo. App. 1994) (“CC II”); *66 Drive-In, Inc. v. Hycel Partners, III, L.P.*, 897 S.W.2d 203 (Mo. App. 1995) (“CC III”); and finally *66, Inc. v. Crestwood Commons Redev. Corp.*, 998 S.W.2d 32 (Mo. banc 1999) (“CC IV”).

possible condemnation of the Property, 66 purchased the fee interest in the Property for \$3.5 million (L.F.87, 126; *CC I*, 812 S.W.2d at 906).

In 1988, the City selected respondent Crestwood Commons Redevelopment Corporation (“Crestwood Commons”) to develop the Property over two competing developers, including the developer favored by 66, Crestwood Festival Associates, L.P. (“Crestwood Festival”). *CC I*, 812 S.W.2d at 907. Crestwood Commons, which was formed as a Chapter 353 urban redevelopment corporation by respondents Hycel Partners III, L.P. (“Hycel”) and Schnuck Markets, Inc. (“Schnucks”), was then authorized by the City to acquire the Property by eminent domain. *CC IV*, 998 S.W.2d at 36-37. As set forth in more detail below, this appeal arises out of Crestwood Commons’ attempt to acquire the Property by condemnation and its ultimate abandonment of the condemnation action as authorized by §523.040 RSMo.

### **The Condemnation Action and Abandonment**

On July 13, 1989, Crestwood Commons filed a condemnation action to acquire the Property. *CC IV*, 998 S.W.2d at 37. 66 resisted that effort and persuaded Judge Robert Lee Campbell to deny Crestwood Commons the right to condemn the Property. That decision was reversed by the Eastern District of the Court of Appeals on June 25, 1991, in *CC I*, 812 S.W.2d at 905.

On December 16, 1991, condemnation commissioners appointed by the circuit court returned an award of damages for the Property in the amount of \$7,399,990. *CC IV*, 998 S.W.2d at 37. Both 66 and Crestwood Commons filed exceptions to the

award and asked for a jury trial. Several months later, on July 10, 1992, Crestwood Commons exercised the right given it by §523.040 and filed a notice of abandonment of the condemnation action. *Id.*

### **The Statutory Interest Award**

Following the abandonment, 66 filed a motion in the condemnation action seeking an award of statutory interest on the commissioners' award pursuant to §523.045. *Id.* At the hearing on the motion, 66 presented evidence of alleged damages resulting from the abandonment of the condemnation, including attorneys' fees and mortgage interest payments it allegedly had incurred as a result of the condemnation proceeding (L.F. 100-01, 168-72). Based on the evidence at that hearing, 66 obtained a judgment against Crestwood Commons in 1993 in the amount of \$250,586.64, which was affirmed by the Court of Appeals in *CC II*, 882 S.W.2d 319. Defendants have paid that judgment in full, with interest, in the aggregate amount of \$391,912 (L.F. 73).

### **66's Claims in this Action**

66 filed this separate lawsuit on November 10, 1992. Initially, it sought specific performance of the Development Agreement between Crestwood Commons and the City, claiming that it was a third-party beneficiary of that agreement, and asked the court to compel Crestwood Commons to carry through with the condemnation and pay it the \$7,399,990 commissioners' award. *CC IV*, 998 S.W.2d at 37. In November 1993, 66 sold the Property to National Super Markets, Inc., for nearly \$8 million, thereby mooting the specific performance request. *Id.* at 37-38.

Despite the sale of the Property for \$600,000 more than the commissioners' award, 66 filed a second amended petition seeking damages allegedly caused by the abandonment of the condemnation action (L.F. 10). It did not allege bad faith or unreasonable delay but characterized its claim as a "tort action separate from the condemnation action" (L.F. 14). Its pleaded claims included \$2,500,000 for a "lost sales opportunity" and more than \$150,000 for legal fees and expenses in defending against the condemnation action (L.F. 14). In answer to interrogatories it expanded its theory to encompass more than \$2 million in interest on loans allegedly obtained to finance its acquisition of the fee interest in the Property, over \$500,000 in legal fees, and various "miscellaneous" expenses, including fees for appraisers, engineers, architects, and court reporters (L.F. 104-13).

On December 4, 1997, Judge Maura McShane granted summary judgment in favor of respondents and dismissed 66's damage claims. After an affirmance by the Court of Appeals, the case was transferred to this Court, which reversed the summary judgment in *CC IV*, 998 S.W.2d 32.

Judge Wolff's opinion for the Court noted that a line of Missouri cases extending from the civil war era until the early 1930s had allowed landowners to recover attorneys' fees and litigation costs incurred in defending an abandoned condemnation action by a non-governmental condemnor, such as a railroad. *See, e.g., North Missouri R.R. Co. v. Lackland*, 25 Mo. 515 (1857); *Nifong v. Texas Empire Pipe Line Co.*, 40 S.W.2d 522, 532 (Mo. App. 1931). Based on that line of cases, the Court ruled that 66 had a viable common-law cause of action for damages based on the abandonment of the

condemnation action. The Court concluded that 66 could recover “attorney’s fees and other reasonable expenses and losses suffered as a result of [Crestwood Commons’] abandonment of the condemnation” and remanded the case to the trial court for a trial on damages only. *CC IV*, 998 S.W.2d at 37. Recognizing, however, that 66 had already obtained a judgment for more than \$250,000 under § 523.045, the Court directed the “trial court, upon remand, to avoid duplicative recovery if damages claimed in the wrongful abandonment claim overlap the interest award provided by section 523.045.” *Id.* at 40.

### **The Partial Summary Judgment on 66’s Alleged Damages**

Plaintiff claimed that the condemnation had prevented it from closing on a contract to sell the Property to Crestwood Festival for \$7.2 million, which allegedly would have been consummated on September 13, 1989 (L.F. 218).<sup>2/</sup> 66 maintained that its supposed inability to sell the Property caused it to incur additional “carrying costs” —

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<sup>2/</sup> Although this was the original closing date for the Crestwood Festival contract, the parties disputed whether Crestwood Festival was actually willing and able to close at that time. Crestwood Festival obtained numerous extensions of the closing date and paid \$182,054 to 66 in consideration of those contract extensions (Tr. 120-23, 133-36). In the end, 66 and Crestwood Festival abandoned the contract due to Crestwood Festival’s financial inability to complete the transaction (Tr. 195-96). The Property ultimately was sold to another buyer for nearly \$8 million. *CC IV*, 998 S.W.2d at 37.

mortgage payments and real estate taxes — and to lose the benefit of amounts spent to prepare the Property for sale (which it characterized as “sunk costs”). 66 contended that it was entitled to damages of more than \$5.5 million, including: (a) \$2,421,510 in mortgage interest paid on loans taken against the Property, the proceeds of which were used to purchase the fee interest in the Property and to finance a wholly unrelated theatre acquisition by a sister corporation (the “General Cinema acquisition”); (b) \$369,832.06 in legal fees, including fees incurred in prosecuting this action; (c) \$98,594 for so-called “sunk costs” incurred prior to the condemnation as a result of its attempts to sell the property to the developer of its choosing; (d) \$398,445 in real estate taxes paid while theatre operations continued during and after the condemnation action; and (e) \$2,332,809 in prejudgment interest on its other claimed “damages” (L.F. 104-14).

Defendants maintained that plaintiff had not suffered any damages, because it ultimately sold the Property after the condemnation for \$8 million — nearly \$600,000 more than the commissioners’ award and \$800,000 more than the \$7.2 million contract it had negotiated for the sale of the property before the condemnation (L.F. 89, 132-33, 150-51). Defendants also observed that 66 continued to enjoy the use of the property during the condemnation by operating a profitable drive-in theatre throughout that period (L.F. 91; Tr. 159-64, 185-93). In addition, defendants argued for a complete set-off of the previously-paid \$ 523.045 judgment against any other damages to which 66 might be entitled.

On cross-motions for summary judgment, Judge Wallace granted defendant’s motion in part and denied 66’s cross-motion (L.F. 235-41). She concluded

that 66 was not entitled to its so-called “sunk costs” for amounts spent in preparing the Property for sale (including its payment of \$60,000 to Emmis Broadcasting for a “lease termination fee”) because those amounts were “wrapped into the purchase price” which a buyer was willing to pay for the Property (L.F. 237). She also ruled that 66 was not entitled to prejudgment interest on any of its damages because (a) the damages sought were not liquidated or readily ascertainable, and (b) 66 failed to comply with § 408.040, relating to prejudgment interest for tort claims (L.F. 240).

The trial court granted summary judgment dismissing 66’s claims for “carrying costs” only in part, saying: “If, but for the condemnation, Plaintiff would no longer have been the owner of the property after September 13, 1989 Plaintiff is entitled to the losses it suffered as a result of having to remain the owner” (L.F. 239). Regarding the mortgage payments made on the loan used to purchase the fee interest in the Property, she concluded that, to the extent that the condemnation prevented 66 from selling the Property to Crestwood Festival, 66 could recover interest paid after the September 13, 1989, closing date for the Crestwood Festival contract up to the date that mortgage loan was paid off in November 1989 (L.F. 238). With regard to the subsequent mortgage loan used to finance the General Cinema acquisition, however, the court determined that the interest payments were not recoverable based on findings of fact that the decision to borrow those funds was a separate business decision and that the interest payments were not caused by the condemnation (L.F. 238-39).

As for plaintiff’s claims for reimbursement of real estate taxes paid during the pendency of the condemnation, the court concluded that 66 was entitled to recover

real estate taxes paid only to the extent that the revenues it earned from drive-in theater operations were exceeded by its expenses from theatre operations, including real estate taxes (L.F. 239).

Judge Wallace denied defendants' request for summary judgment, pursuant to the "American Rule," on 66's claim for attorneys' fees incurred in prosecuting this case (as distinguished from the fees incurred in prosecuting the condemnation action, which were not at issue at the summary judgment stage) (L.F. 240). Noting that 66 had conceded that there was no statutory or contractual basis for its claim for attorneys' fees incurred in this case, she nevertheless concluded that 66 could recover those fees under the "collateral litigation and or benefits balancing exception to the rule against recovery of attorneys fees," although her order did not explain why (L.F. 240).

Finally, the court denied defendants' motion for summary judgment based on their request for a complete setoff of amounts paid on the judgment for interest on the abandoned condemnation award pursuant to § 523.045 (L.F. 241). It held that defendants were entitled to some setoff, but that there remained material issues of fact concerning the amount of the previous interest judgment that constituted attorneys' fees (L.F. 241).

### **The Evidence at Trial**

The parties tried 66's remaining damage claims to the court on July 12, 2001. Plaintiff asked the court to award the following damages (Tr. 6-9):

Attorneys' fees incurred in defending condemnation action	\$278,911
Attorneys' fees incurred in prosecuting this action	\$133,107
Mortgage interest	\$ 47,174
Real estate taxes	<u>\$119,075</u>
TOTAL	\$578,167

### *Attorneys' Fees*

In support of its claim for \$278,811 in attorneys' fees relating to the defense of the condemnation action, 66 presented testimony by Charles Seigel, III, an attorney who purported to testify as an expert witness regarding the reasonableness of 66's attorneys' fee request (Tr. 15-91). 66 relied almost entirely upon Seigel and did not adduce testimony from any of the lawyers whose fees were at issue but introduced only some scattered billing statements relating to the fees for which it sought reimbursement.

66's attorney of record in the condemnation action was Daniel Rabbitt (Tr. 23). Although defendants did not challenge 66's entitlement to recover fees paid to Rabbitt in connection with the defense of the condemnation action, the actual amount of Rabbitt's fees was unproven because all of his fee statements were not in evidence. Moreover, a number of the statements that were in the record related to the defense of Crestwood Festival in the separate declaratory judgment action, rather than to the defense of 66 in the condemnation case (Tr. 41-48; Def't Ex. A).

In addition to fees for its counsel of record in the condemnation case, 66 also sought recovery of more than \$170,000 in fees paid to the Nations & Mueller law firm, which never entered an appearance in that case (Tr. 24). Nations & Mueller

rendered services for various Wehrenberg Theater entities relating to a multitude of different legal matters (Tr. 136-37). The firm acted as general counsel to 66 and the other entities in the Wehrenberg Theater empire, of which 66 was but a small part (Tr. 136-37). The random Nations & Mueller fee statements offered in evidence covered multiple legal matters and merely assigned a percentage of the total to “Sixty-Six Drive-In” without any indication that those items related to the defense of the condemnation action, as distinguished from other drive-in matters (Tr. 57-58, 107-10, 136-38; Def’t Ex. C). Moreover, the totals derived from those various statements did not correspond to the total fees sought and awarded for Nations & Mueller’s services. Terrence Mueller conceded that a number of Nations & Mueller time entries were doubtful or improper (L.F. 45-51).

Attorney Seigel testified that he found all of 66’s claimed attorneys fees to be reasonable and related to the condemnation case (Tr. 21-27). In so doing, he relied heavily on the conclusions of the lawyers who had performed those services (Tr. 21, 24-25). Although he claimed he had read Mueller’s deposition, he admitted that he had not excluded any fees based on that testimony (Tr. 84-87). He further acknowledged that he did not carve out fees associated with counsel’s defense of Crestwood Festival in an unrelated declaratory judgment action from those relating to the defense of the condemnation action (Tr. 41-48).

### ***Mortgage Interest and Property Taxes***

In support of its claims for \$47,174 in mortgage interest and \$119,075 in property taxes, 66 presented testimony by Ronald Krueger, its chief executive officer.<sup>3/</sup> Krueger testified that plaintiff was unable to sell the Property after the filing of the condemnation action because of the alleged cloud on the title created thereby despite the fact that plaintiff itself had bought the Property for \$3.5 million after it had been declared blighted as a precursor to condemnation (Tr. 173). Krueger admitted that 66 had entered into a contract with Crestwood Festival on March 9, 1989, with full knowledge that the City of Crestwood had selected Crestwood Commons to redevelop the site, and also conceded that there was no contingency in the contract relating to the condemnation action (Tr. 197-99). Krueger acknowledged that the closing date for the contract was extended eleven times and that 66 was paid more than \$182,000 in consideration for its continued willingness to extend the closing date (Tr. 173-83, 211-15). On cross

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<sup>3/</sup> The amount of property taxes claimed was reduced to \$90,058 after 66's accounting expert admitted on cross examination that she had calculated the amount of real estate taxes incorrectly for the period in question (Tr. 153-58). There was no dispute that 66 paid \$47,174 in mortgage interest during the applicable period. Of course, defendants dispute the recoverability of both of these categories of alleged damages, particularly in view of 66's receipt of the \$182,054 contract extension payments, which the trial court did offset against the mortgage interest, but not against the property taxes.

examination, Krueger was unable to explain why Crestwood Festival would pay more than \$182,000 in the face of 66's supposed inability to perform due to an alleged cloud on the title resulting from the condemnation (Tr. 212-14). He also conceded that 66 and Crestwood Festival ultimately allowed the contract to lapse because of Trammell Crow's financial inability to perform and the failure to secure Toys-R-Us as a tenant in the proposed development (Tr. 196).

### **The Trial Court's Judgment**

The trial court entered its Findings of Fact, Conclusions of Law and Judgment on April 9, 2002, awarding 66 a net total of \$392,612 in damages (L.F. 243-47). The award included all of the \$278,811 sought by 66 for legal fees incurred in defending the condemnation action, plus \$136,507 for legal fees incurred by its counsel in prosecuting the present case. The trial court rejected 66's claim for mortgage interest payments in the amount of \$47,174, finding that those payments were offset by the \$182,054 contract extension payments. The court refused to apply the same logic, though, to 66's claim for real estate taxes paid, instead characterizing the \$182,054 contract extension payment as an "extraordinary item" that could be excluded for purposes of determining whether the drive-in business was profitable during the condemnation period. Accordingly, the court awarded \$90,058 for real estate taxes paid on the Property between September 13, 1989 (the date 66 allegedly could have sold the Property to Crestwood Festival but for the pendency of the condemnation proceedings) and the date the Property was sold in November 1993. The gross damage calculation thus totaled \$505,376.

On defendants' request for a setoff based on the earlier § 523.045 judgment, the trial court adopted a formula of its own invention to limit the setoff to \$112,764, or 45% of the award previously collected by 66 pursuant to § 523.045. The trial court's calculation appears to be based upon its view of the amount of attorneys' fees and mortgage interest included in the interest judgment award, although there was no testimony at the § 523.045 hearing regarding any breakdown of those amounts. After applying the setoff amount to the total damage award, the trial court entered judgment in favor of plaintiff for \$392,612.

### **The Court of Appeals' Opinion**

Unhappy with an award of "only" \$400,000, plaintiff appealed to the Court of Appeals, and defendants thereafter cross-appealed. The Eastern District affirmed in part and reversed in part. In a comprehensive opinion by Judge Kathianne Knaup Crane, the court examined this Court's decision in *CC IV* in its historical context and ruled that the previous award of \$250,582 under § 523.045 RSMo had fully compensated plaintiff for any practical deprivation of proprietary rights in the Property caused by the condemnation and the statutorily-authorized abandonment (A-14-16).<sup>4/</sup>

Applying *CC IV* in light of a long string of Missouri common-law cases (including those relied on by this Court in *CC IV*), the court noted that recovery of "other reasonable expenses and losses" had historically been equated to the "costs of the case and counsel

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<sup>4/</sup> The opinion of the Eastern District is reproduced in Appendix A, post, which will be cited as "A-\_\_."

fees incurred in defense of the condemnation action.” *Id.* at 16-20. The court rejected defendants’ argument that plaintiff had not been damaged at all, even though it ultimately sold the property for \$600,000 more than the commissioners’ award and \$800,000 more than the amount of the Crestwood Festival contract, reasoning that this Court’s opinion in *CC IV* mandated some type of damage award and that the financial consequences of the abandonment should be disregarded. *Id.* at 20-21.

On plaintiff’s claim for mortgage interest paid prior to the sale of the property, the court noted that no court had ever upheld such a theory of recovery in the context of a condemnation abandonment and that plaintiff’s strained theory of causation was “an unjustified attempt to convert the act of abandonment, an action a condemnor has a right to take, into a wrongful act giving rise to a tort-based theory of liability.” *Id.* at 21-22. The court further observed that the consequences of plaintiff’s alleged inability to sell the Property had been compensated in the interest award made under § 523.043.

Plaintiff’s claim for “sunk costs” was disallowed because any enhancement in the value of the property resulting therefrom was reflected in the Commissioners’ award and the ultimate sales price and, further, was compensated in the interest award. The claim for real estate taxes was also rejected as unprecedented and duplicative of the § 523.043 judgment. Taxes are simply a normal expense incident to property ownership (A-24-25).

As for attorneys’ fees, the Court of Appeals reversed the award of fees for the present case, holding that the American Rule, consistently applied in Missouri, requires parties to pay their own lawyers, absent some exception which is not applicable here. *Id.*

at 30-32. The award of fees in the underlying condemnation action was vacated and remanded because the testimony of plaintiff's expert witness lacked foundation and because the award obviously included fees that were not spent on the condemnation case. *Id.* at 26-30. A new trial was ordered to determine the proper amount of recoverable fees. *Id.* at 30.

Finally, the court held that there should be no offset for the earlier award of interest under § 523.043, as that action compensated for loss of use of the Property and did not cover attorneys' fees.

## **POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF-APPELLANT 66, INC., ANY DAMAGES BECAUSE IT DID NOT SUFFER ANY LOSS AS A RESULT OF THE CONDEMNATION OR THE ABANDONMENT OF THE CONDEMNATION ACTION IN THAT IT MADE A SIGNIFICANT PROFIT FROM THE SALE OF THE PROPERTY TO A THIRD PARTY AFTER THE ABANDONMENT.**

Ours v. City of Rolla, 14 S.W.3d 627 (Mo. App. 2000);

Gilmartin Bros. v. Kern, 916 S.W.2d 324 (Mo. App. 1995);

Leonard v. American Walnut Co., 609 S.W.2d 452 (Mo. App. 1980);

Gesellschaft Fur Geratebau v. GFG America Gas Detection, Inc.,

967 S.W.2d 144 (Mo. App. 1998).

**II. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$136,507 IN ATTORNEYS' FEES FOR WORK PERFORMED BY ITS LAWYERS IN PROSECUTING THIS CASE, BECAUSE THE AMERICAN RULE, WHICH HAS LONG BEEN FOLLOWED IN MISSOURI, REQUIRES EACH PARTY TO PAY ITS OWN LAWYERS IN THE ABSENCE OF STATUTORY AUTHORIZATION, CONTRACTUAL AGREEMENT, OR EXCEPTIONAL CIRCUMSTANCES NOT PRESENT HERE.**

North Missouri R.R. Co. v. Lackland, 25 Mo. 515 (1857);

Nifong v. Texas Empire Pipe Line Co., 40 S.W.2d 522 (Mo. App. 1931);

Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458

(Mo. App. 1990);

City of Cottleville v. St. Charles County, 91 S.W.3d 148 (Mo. App. 2002).

**III. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$90,058 FOR REAL ESTATE TAXES PAID DURING THE PENDENCY OF THE CONDEMNATION BECAUSE SUCH TAXES WERE NOT AN ACTUAL LOSS CAUSED BY DEFENDANTS BUT WERE A NATURAL CONCOMITANT OF PROPERTY OWNERSHIP IMPOSED BY LAW, IN THAT PLAINTIFF IS NOT ENTITLED TO RECOVERY OF INCIDENTAL AND CONSEQUENTIAL TORT DAMAGES BUT IS LIMITED TO RECOVERY OF LITIGATION-CONNECTED LOSSES PROXIMATELY INFLICTED BY THE CONDEMNOR.**

66, Inc. v. Crestwood Commons Redev. Corp., 998 S.W.2d 32 (Mo. banc 1999);

Nifong v. Texas Empire Pipe Line Co., 40 S.W.2d 522 (Mo. App. 1931);

Annotation, 92 ALR 2d 355 (1963);

Simpson v. Kansas City, 111 Mo. 236 (1892);

Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo. 1957);

Nichols on Eminent Domain, § 26D.01[6] (3d rev. ed., 2002).

**IV. THE TRIAL COURT ERRED IN ALLOWING 66 TO RECOVER ALL ITS ATTORNEYS' FEES ALLEGEDLY RELATED TO THE DEFENSE OF THE CONDEMNATION ACTION BECAUSE PLAINTIFF FAILED TO SUSTAIN ITS BURDEN TO SHOW THAT THOSE FEES WERE REASONABLE AND NECESSARY TO THE DEFENSE OF THE CONDEMNATION ACTION IN THAT THE CLAIM FOR FEES WAS INADEQUATELY DOCUMENTED AND PLAINLY INCLUDED FEES PAID FOR OTHER MATTERS, AND PLAINTIFF'S "EXPERT TESTIMONY" LACKED FOUNDATION AND COULD NOT CURE THE DEFECTS IN ITS PROOF.**

Hester v. American Family Mut. Ins. Co., 733 S.W.2d 1 (Mo. App. 1987);

Manfield v. Auditorium Bar & Grill, Inc., 965 S.W.2d 262 (Mo. App. 1998);

Mueller v. Bauer, 54 S.W.3d 652 (Mo. App. 2001);

State ex rel. Missouri Highway & Transp. Comm'n v. Modern Tractor & Supply Co., 839 S.W.2d 642 (Mo. App. 1992).

**V. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS/CROSS-APPELLANTS A COMPLETE SET-OFF FOR THEIR PAYMENT OF THE PRIOR JUDGMENT OBTAINED BY 66 PURSUANT TO § 523.045 RSMO., BECAUSE 66 WAS THEREBY ALLOWED A WINDFALL DOUBLE RECOVERY IN VIOLATION OF THIS COURT’S MANDATE IN THAT THE PRIOR AWARD CONSISTED OF ATTORNEYS’ FEES THAT WERE ALSO INCLUDED IN THE PRESENT JUDGMENT.**

66, Inc. v. Crestwood Commons Redev. Corp., 998 S.W.2d 32 (Mo. banc 1999);  
City of Cottleville v. American Topsoil, Inc., 998 S.W.2d 114 (Mo. App. 1999);  
§ 523.045 RSMo.

**VI. THE TRIAL COURT DID NOT ERR IN DISALLOWING RECOVERY TO PLAINTIFF FOR MORTGAGE INTEREST PAYMENTS MADE TO PLAINTIFF’S LENDER. (Response to Points I and III of Appellant’s Substitute Brief.)**

Kassebaum v. Kassebaum, 42 S.W.3d 685 (Mo. App. 2001);  
Mullenix-St. Charles Props., L.P. v. City of St. Charles, 983 S.W.2d 550  
(Mo. App. 1998).

**VII. THE TRIAL COURT DID NOT ERR IN DISALLOWING 66'S CLAIM FOR "SUNK COSTS" OF \$60,000 INCURRED BEFORE THE CONDEMNATION IN BUYING OUT THE LEASEHOLD INTEREST OF ONE OF ITS TENANTS. (Response to Point II of Appellant's Substitute Brief.)**

**VIII. THE TRIAL COURT PROPERLY FOLLOWED THIS COURT'S MANDATE IN OFFSETTING THAT PORTION OF THE CURRENT AWARD THAT OVERLAPPED THE PREVIOUS AWARD IN THE § 523.045 PROCEEDING, THOUGH IT ERRED IN CALCULATING THE EXTENT OF THAT OVERLAP. (Response to Point IV of Appellant's Substitute Brief.)**

Kassebaum v. Kassebaum, 42 S.W.3d 685 (Mo. App. 2001);

Mullenix-St. Charles Props., L.P. v. City of St. Charles, 983 S.W.2d 550

(Mo. App. 1998);

§ 523.045 RSMo.

**IX. THE TRIAL COURT CORRECTLY RULED THAT 66 WAS NOT ENTITLED TO PREJUDGMENT INTEREST. (Response to Point V of Appellant's Substitute Brief.)**

City of St. Peters v. Hill, 9 S.W.3d 652 (Mo. App. 1999);

Schreibman v. Zanetti, 909 S.W.2d 692 (Mo. App. 1995);

Fohn v. Title Ins. Corp., 529 S.W.2d 1 (Mo. banc 1975);

### **STANDARD OF REVIEW**

The trial court's grant of partial summary judgment is reviewed by this Court *de novo*, using the same standards applicable below. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

The court's calculation of damages following the bench trial is reviewed to determine if there is substantial evidence to support it, whether it is against the weight of the evidence, and whether it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Devine v. Gateway Ins. Co.*, 60 S.W.3d 6, 8 (Mo. App. 2001). But the issues presented in Points I, II, III, V, VI, VII, VIII, and IX of this brief present legal questions concerning the right to recover certain categories of damages, which are reviewable by this Court *de novo*. *Consol. Pub. Water Supply Dist. v. Kreuter*, 929 S.W.2d 314, 316 (Mo. App. 1996).

## **ARGUMENT**

### **BRIEF AS CROSS-APPELLANTS**

**I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF-APPELLANT 66, INC., ANY DAMAGES BECAUSE IT DID NOT SUFFER ANY LOSS AS A RESULT OF THE CONDEMNATION OR THE ABANDONMENT OF THE CONDEMNATION ACTION IN THAT IT MADE A SIGNIFICANT PROFIT FROM THE SALE OF THE PROPERTY TO A THIRD PARTY AFTER THE ABANDONMENT.**

Although 66 attempts to portray itself as an innocent landowner victimized by rapacious developers, the facts show that 66 was a shrewd real estate speculator that made millions on this transaction. 66 knew the Property had already been blighted when it made the decision to borrow \$3.5 million to purchase the fee interest in the Property. 66 was not a witless victim; rather it was an opportunistic real estate speculator looking to profit from the eventual sale or development of the Property. It was spectacularly successful but still persists in prolonging this seemingly endless litigation in search of an even bigger payday.<sup>5/</sup>

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<sup>5/</sup> The Court of Appeals misread this Court's opinion in *CC IV* as requiring an award of damages irrespective of the financial consequences of the abandonment. This Court held only that 66 could recover losses it could prove. By any acceptable definition, it had no "loss" because profits cannot be ignored when determining existence of a loss, just as expenses cannot be ignored when determining the

Before the condemnation action was filed, 66 had entered into a contract to sell the Property for approximately \$7.2 million. The condemnation commissioners appointed to value the property in December 1991 ruled that it was worth approximately \$7.4 million. Little more than a year after the abandonment, 66 sold the Property to National Super Markets for nearly \$8 million – approximately \$600,000 more than the condemnation commissioners’ award and \$800,000 more than the pre-condemnation contract amount. On its corporate tax return, 66 reported a gain on the sale of the Property in the amount of \$3,529,276 (Tr. 139, 167-69).<sup>6/</sup>

Plaintiff was never deprived of the use of the Property during the condemnation proceedings. Its profitable drive-in theater operations continued unabated. In fact, 66’s annual theater revenues increased each year during the pendency of the

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existence of a profit. *See Gesellschaft Fur Geratebau v. GFG America Gas Detection, Inc.*, 967 S.W.2d 144, 147 (Mo. App. 1998), citing *Anderson v. Abernathy*, 339 S.W.2d 817, 824 (Mo. 1960).

<sup>6/</sup> This amount of gain reported to the IRS would have been even greater if 66 had not capitalized all but approximately \$60,000 in attorneys fees incurred in connection with this transaction (Tr. 139). Although those fees have already been recovered from the purchase price, 66 seeks duplicative recovery for them in this action, as discussed more fully below.

condemnation proceedings, going from approximately \$281,000 in 1989 to \$416,000 in 1993.<sup>7/</sup>

In addition, 66 has already recovered other funds which further increase the gains it made on this investment. Plaintiff collected \$182,054 in contract extension payments from Crestwood Festival and later was paid nearly \$400,000 (\$250,586 in principal plus interest) by defendants on the judgment entered pursuant to § 523.045.

Plaintiff simply had no “loss” which it can lay off on defendants. Its claim for damages in this case is foreclosed by the rationale of *Ours v. City of Rolla*, 14 S.W.3d 627 (Mo. App. 2000). In that case, the City of Rolla had entered into a contract to sell a piece of park property for \$500,000 to developers of a proposed Cracker Barrel restaurant. The plaintiffs sued to prevent the sale of the property, lost, and then obtained an injunction against the sale pending appeal. After Cracker Barrel walked away and the

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<sup>7/</sup> Plaintiff claims that it lost money on its drive-in theater operations, but the evidence at trial showed otherwise. Although its “damages expert” attempted to establish that 66 had operating losses during this period, 66’s chief financial officer admitted that the drive-in theater was profitable on an after-tax basis (after making adjustment for the interest expense 66 took on to allow Wehrenberg to finance the General Cinema acquisition) (L.F. 135-36). Additionally, 66’s expert acknowledged that her calculation of operating income excluded the \$182,045 payment which 66 received from Crestwood Festival for extending the closing date of the contract (Tr. 160-61).

injunction was dissolved, the City sought damages against the plaintiffs' injunction bond. The Southern District Court of Appeals reversed the trial court's award of damages against the injunction bond, holding that the trial court had erroneously refused to consider an appraisal showing that the value of the property had increased to \$680,000 during the pendency of the proceedings. The court held that the plaintiffs were entitled to show that the City had suffered no damage because of the increase in value of the property during the pendency of the injunction.

In reaching this conclusion, the court reasoned that the City's claim for damages against the injunction bond was no different than the claim the City would have had if the Cracker Barrel developers had breached the \$500,000 contract to purchase the park property. In those circumstances, the court observed, the measure of damages would be the "difference between the contract price and the market value of the property on the date the sale should have been completed." *Ours*, 14 S.W.3d at 629, quoting *Gilmartin Bros. v. Kern*, 916 S.W.2d 324, 332 (Mo. App. 1995). "Obviously, where market value equals or exceeds the contract price in the agreement breached, the seller has suffered no loss and is entitled to no recovery from the buyer." *Id.* at 629, quoting *Leonard v. American Walnut Co.*, 609 S.W.2d 452, 455 (Mo. App. 1980).

The court in *Ours* likened that situation to a defaulting buyer in a real estate sales contract:

"A defaulting buyer is entitled to show the seller of real estate suffers no damage if the fair market value of the subject property equals or exceeds the purchase price . . . . [The evidence of fair market value] would

have demonstrated that the City suffered no loss as a direct result of the injunction against selling Buehler Park.” *Id.* at 629.

*Ours*, *Kern*, and *Leonard* thus stand for the common-sense proposition that one is not injured by an inability to sell property for less than its value. Hence, even if the condemnation proceedings had arguably prevented 66 from selling the property to Crestwood Festival in accordance with the \$7.2 million contract, 66 was not damaged because the fair market value of the property, as indicated by the sale to National Super Markets, substantially exceeded that sum.<sup>8/</sup> Indeed, this case is even more compelling than *Ours* because 66 has *actually realized* a benefit of \$800,000 by disposition of the property at the higher value. It has also been paid an additional \$182,054 by Crestwood Festival and nearly \$400,000 by defendants pursuant to the \$ 523.045 judgment (in addition to profits from the theater operation).

Having thus been enriched by more than \$1.3 million above and beyond the Crestwood Festival sales price, 66’s request for an additional windfall rings hollow and should be soundly rejected. The judgment below should be reversed in its entirety.<sup>9/</sup>

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<sup>8/</sup> The trial court’s conclusion that the condemnation might not have accounted for the increase in value (L.F. 239 ¶ 14) is irrelevant. The only pertinent point is that the property became more valuable — for whatever reason.

<sup>9/</sup> Because we believe that the authorities in this Point I prevent *any* recovery by 66, the balance of the arguments in this brief, both on the appeal and the cross-appeal,

**II. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$136,507 IN ATTORNEYS' FEES FOR WORK PERFORMED BY ITS LAWYERS IN PROSECUTING THIS CASE, BECAUSE THE AMERICAN RULE, WHICH HAS LONG BEEN FOLLOWED IN MISSOURI, REQUIRES EACH PARTY TO PAY ITS OWN LAWYERS IN THE ABSENCE OF STATUTORY AUTHORIZATION, CONTRACTUAL AGREEMENT, OR EXCEPTIONAL CIRCUMSTANCES NOT PRESENT HERE.**

The trial court made new law when it allowed 66 to recover attorneys' fees paid to its trial counsel for prosecuting this case. Nothing in this Court's earlier opinion authorized recovery of those fees. Nor did any of the older Missouri cases invoked by this Court in *CC IV* allow landowners to recover fees for prosecuting a separate action against the condemnor. In *Lackland*, 25 Mo. at 534, this Court in the original condemnation case said that costs should be adjusted "according to equity" and recoverable expenses "will embrace all the costs of the case and counsel fees, both here [on appeal] and in the court where the case was tried." *See also Nifong*, 40 S.W.2d at 524 (condemnee can recover "expenses and costs, including attorneys' fees" which have been incurred "of necessity" because of the condemnation). Because the only allowances in prior Missouri cases were for fees and costs actually incurred in the defense of the

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are made *arguendo*, in the event the Court does not find Point I completely dispositive.

original condemnation action, plaintiff's recovery of \$136,507 in fees for prosecution of this case is unprecedented and erroneous, as the Court of Appeals correctly determined.

“Missouri follows the ‘American Rule’ which is that with few exceptions, absent statutory authorization or contractual agreement, each litigant must bear the expense of his own attorney’s fees.” *Washington Univ. v. Royal Crown Bottling Co.*, 801 S.W.2d 458, 468 (Mo. App. 1990). “Under Missouri law, a party is not entitled to fees except when authorized by statute or by contractual agreement.” *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62, 66-67 (Mo. App. 2000). Indeed, the trial court recognized that there was no statutory authorization or contractual agreement which would allow 66 to recover legal fees and expenses incurred in prosecuting this action (L.F. 240). Nevertheless, the court concluded that 66 was entitled to them under “either or both” the “collateral litigation” and the “benefits balancing” exceptions to the American Rule, without specifying which exception applied or why (L.F. 240). Whatever its thought process, the court was wrong.

The “collateral litigation” exception manifestly is inapplicable in these circumstances. This exception applies only to attorneys’ fees expended to defend a different, collateral action brought by a third party against the plaintiff and caused by the present defendant’s breach of duty. *City of Cottleville v. St. Charles County*, 91 S.W.3d 148, 150 (Mo. App. 2002); *Reed v. Reed*, 10 S.W.3d 173, 182 (Mo. App. 1999). It does not allow recovery of fees in the existing litigation. *Id.*; *see also Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 809 (Mo. App. 1998) (“To meet the collateral litigation exception, there must be a showing that the attorney fees were incurred in other litigation against a

third party which is actually collateral to litigation involving the parties.”). 66 flunks all three prongs of this test. Defendants here are not third parties; the fees sought are not costs of defense; and they were not incurred in collateral litigation.

The trial court’s unexplicated reliance on the so-called “benefits balancing” exception to the American Rule is even farther off the mark. As the Western District recently noted, Missouri courts have applied this exception in equitable proceedings only in “those rare situations where a party's pursuit of litigation enures to the benefit of the other parties, such as obtaining clarification of the terms of a trust.” *Moore v. Weeks*, 85 S.W.3d 709, 723 (Mo. App. 2002), quoting *Consol. Pub. Water Supply Dist. v. Kreuter*, 929 S.W.2d 314, 317 (Mo. App. 1996). Recovery was disallowed in *Moore* because, like here, the litigation was brought only to benefit the plaintiffs and did not inure to the advantage of any third parties. Moreover, this is a legal action, not one in equity. Consequently, the extraordinary circumstances necessary to invoke the very narrow “benefits balancing” exception to the American Rule are not present here. In *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 156 (Mo. App. 2000), the court said that this exception applies only in “very unusual” circumstances, absent which the “stringent American Rule requir[es] parties to bear their own attorney’s fees.”

Because there is no statutory, contractual, or equitable basis for the unprecedented award of attorneys’ fees based on work performed by plaintiff’s trial counsel in this case, the trial court’s judgment awarding those fees should be reversed.

**III. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$90,058 FOR REAL ESTATE TAXES PAID DURING THE PENDENCY OF THE CONDEMNATION BECAUSE SUCH TAXES WERE NOT AN ACTUAL LOSS CAUSED BY DEFENDANTS BUT WERE A NATURAL CONCOMITANT OF PROPERTY OWNERSHIP IMPOSED BY LAW, IN THAT PLAINTIFF IS NOT ENTITLED TO RECOVERY OF INCIDENTAL AND CONSEQUENTIAL TORT DAMAGES BUT IS LIMITED TO RECOVERY OF LITIGATION-CONNECTED LOSSES PROXIMATELY INFLICTED BY THE CONDEMNOR.**

**A. There Is No Precedent for Plaintiff’s Claim for Incidental and  
Consequential Damages.**

This Court’s opinion in *CC IV* reaffirmed the Missouri common-law rule that, notwithstanding the enactment of § 523.045, a property owner is entitled to recover “attorney’s fees and other reasonable expenses and losses suffered as a result of a private condemnor’s abandonment of the condemnation.” *CC IV*, 998 S.W.2d at 40. This encompasses “‘actual losses inflicted on the land-owner by the institution and maintenance of proceedings to condemn his land’ after the proceedings are discontinued.” *Id.* at 38, quoting *Nifong v. Texas Empire Pipe Line Co.*, 40 S.W.2d 522, 523-24 (Mo. App. 1931).

In allowing recovery of such losses in the absence of statutory authority, Missouri is unique. In an annotation, “Liability, Upon Abandonment of Eminent Domain

Proceedings, for Loss or Expenses Incurred by Property Owner, or for Interest on an Award or Judgment,” 92 ALR 2d 355, 374 (1963), the law is summarized:

“The courts in most of the jurisdictions where the question has been presented adhere to the rule that in the absence of statute a railroad or other quasi-public corporation which abandons eminent domain proceedings in good faith and without unreasonable delay is not liable for the landowner’s attorney fees or other expenses and disbursements on account of the proceeding.”

The annotation then reports that Missouri has definitively held otherwise and that “such liability appears to have been enforced or recognized by decisions or statements of some courts of a few other jurisdictions.” *Id.* at 375, citing an 1850 New York case (allowing fees for witnesses and counsel), an 1896 Ohio case (allowing trial expenses and attorney’s fees), and a 1916 case from South Dakota (remanding for determination of legitimate expenses and injuries, if any, occasioned by the proceedings).

The next succeeding section of the annotation then surveys scores of cases from 17 states which do allow recovery of costs, expenses, and attorneys fees — all pursuant to statute —when a condemnation is abandoned. 92 ALR 2d at 376-98. A perusal of the synopses of those cases reveals not a single instance in which a condemnee was awarded the types of expenses sought here by 66 for property taxes, mortgage interest, or “sunk costs.” On the contrary, the discussion in all the cited cases is confined

to litigation-related expenses such as court costs, witness fees, expert's compensation, and appraisal and attorney's fees.<sup>10/</sup>

Now, even though Missouri is alone in allowing a common-law action for losses caused by abandonment, plaintiff urges the Court to venture even farther out of the mainstream by sanctioning a wide variety of claims for virtually every expenditure made during the pendency of a condemnation, despite the facts that (a) those payments were not caused by the condemnation, (b) they do not constitute "losses," and (c) defendants had a statutorily-conferred right to abandon the condemnation. As noted, none of the states with statutes authorizing recovery of expenses upon abandonment have extended that cause of action to the types of incidental and consequential "damages" sought here. Indeed, our research has not revealed a single case in recorded history in which any legally-sanctioned abandonment has generated the recovery of property taxes, interest

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<sup>10/</sup> Under 42 U.S.C. § 4654, the United States is required to pay "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred" in the event of abandonment of condemnation by the federal government. An annotation, "Award of Costs and Attorney's Fees Under § 304 of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C.A. § 4654)," 172 ALR Fed. 507 (2001), canvassing cases decided under that statute, reveals not a single instance in which a court has awarded any expenses that were not incurred in the defense or prosecution of the litigation itself.

payments, or any other expenses not caused by occupation of the land or incurred in the process of fending off the condemnor. Contrary to plaintiff's assertions (Br. 46-52), there is no authority in Missouri supporting its cause, either. The Court of Appeals exhaustively analyzed the history of Missouri abandonment law, and no useful purpose would be served by duplicating that analysis here. *See* A-13-20. Suffice it to say that the foundational case of *Lackland*, 25 Mo. at 534, confined the "costs and expenses" recoverable by the landowner to the "costs of the case and counsel fees" in the trial and appellate courts, and no decision in this state has endorsed the recovery of incidental or consequential tort-like damages in the context of a statutorily-authorized abandonment.

Plaintiffs' attempt to resuscitate the holding in *Liesse v. St. Louis & Iron Mountain R. Co.*, 2 Mo. App. 105 (1876), *aff'd*, 72 Mo. 561 (1880), regarding recovery of lost rents is both unavailing and irrelevant. This Court in *Simpson v. Kansas City*, 111 Mo. 236, 244-45 (1892), expressly rejected *Liesse* because in *Liesse* there was no statutory or charter right to abandon, and the *Liesse* court had concluded that the abandonment was inconsistent with the prior declaration of necessity and therefore was wrongful and injurious. By contrast in *Simpson*, the City — like defendants here — had the legal right to abandon, and thus the owner's deprivation of full use and enjoyment of his property was "an injury for which no remedy is provided." *Id.* at 246.<sup>11/</sup>

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<sup>11/</sup> Plaintiff's reading of *Simpson* (Br. 50) is flawed. In the first place, the reported decision does not indicate that the plaintiffs were seeking lost rent as damages. Secondly, the only claim deemed viable by the court was not for wrongful

The *Simpson* rationale is an early formulation of the rule of *damnum absque injuria*. In *Hamer v. State Highway Comm’n*, 304 S.W.2d 869, 873 (Mo. 1957), this Court quoted from the bible on condemnation law, *Nichols on Eminent Domain* § 26.45 [now § 26D-01[6]] in language — still applicable today — that forecloses 66’s claim for incidental and consequential damages:

“When condemnation proceedings are discontinued, even where there has been no disturbance of the actual occupancy of the land, the owner often suffers pecuniary loss during the pendency of the proceedings. It is difficult to find tenants and unsafe to build on the land. He [the owner] may stop work on a partly constructed building or adapt it to the proposed improvement. He is almost certain to have incurred an attorney’s fee. But it is held in the absence of bad faith or unreasonable delay upon the part of the party which instituted the proceedings, that the owner is not *constitutionally* entitled to recover such expenses and losses, and, *when the statutes are silent on the subject, no damages will be awarded . . . .* The uncertainty caused by the probability that the proceedings will be carried through and the proposed work constructed over his land differs in degree only from that shared by the owners of all property, which may at any time

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abandonment but for unreasonable delay — a claim 66 has not made and could not make because the delay in this case was almost entirely attributable to its own litigiousness.

be taken by eminent domain whenever it may chance to lie in the path of a public improvement, *and the decrease in income or other loss he may suffer from such uncertainty is damnum absque injuria.*” (Emphasis added.)<sup>12/</sup>

In sum, Missouri already is uniquely generous to landowners in cases of private-condemnation abandonment by allowing them to recover 6% interest on the award under § 523.045 and attorneys’ fees and litigation costs under the common law. Plaintiff’s request to expand this munificence to cover incidental and consequential damages in the absence of a directive from the General Assembly is not only nationally unprecedented but bad policy. It would further widen the unexplained gulf between the treatment accorded to governmental versus non-governmental condemnors. Plaintiff has already been handsomely compensated for its inconvenience, and its plea for a further handout should be rebuffed.<sup>13/</sup>

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<sup>12/</sup> Dozens of cases expressing the same principle are collected in 92 ALR 2d at 404-09.

<sup>13/</sup> Allowance of incidental and/or consequential damages would open the door for claims of “collateral” damage by neighboring landowners in any condemnation area — even though their property was not taken.

**B. Defendant Did Not Breach any Legal Duty to Plaintiff, so as to Give Rise to Plaintiff's Tort-Based Claim for Incidental and Consequential Damages.**

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At trial and in the Court of Appeals, plaintiff candidly acknowledged that its claim for incidental and consequential damages was based in tort and likened to defendants to tort-feasors. *See* Brief for Appellant, No. ED81218, pp. 25-27; L.F. 14. Although plaintiff has deleted any overt reference to tort law in its substitute brief to this Court, its claim for incidental and consequential damages inevitably is predicated on a supposed breach of legal duty — otherwise known as a tort. The problems with any tort analogy are several and serious. First, this Court, in remanding this case, never characterized it as a tort action, but analyzed it as a quasi-contractual matter based on principles of “inherent equity.” *CC IV*, 998 S.W.2d at 38.

Second, condemnation cases are *sui generis*, and “an attempt to analogize condemnation proceedings and other civil actions is very difficult and seldom successful.” *St. Charles County v. Wegman*, 90 S.W.3d 142, 144 (Mo. App. 2002), quoting *Washington Univ. Med. Ctr. Redev. Corp. v. Komen*, 637 S.W.2d 51, 53 (Mo. App. 1982).

Third, the elements of a tort are not present here. A tort requires the breach of a legal duty. *Vanacek v. St. Louis Pub. Serv. Corp.*, 358 S.W.2d 808, 810 (Mo. banc 1962). The “breach” complained of in this case is the abandonment of the condemnation. But that act did not constitute a breach of any duty to 66, for the right to abandon is expressly conferred by statute. *See* § 523.040. Defendants’ conduct was no different

than the action of any litigant who chooses voluntarily to dismiss a civil case before trial. Yet, to allow plaintiff recovery of the species of damages sought here would turn a legal abandonment into a civil wrong — a tort.

Finally, as noted above, neither *CC IV* nor any of the older cases relied on in that opinion authorize the catch-all recovery sought here, as 66 recognized by characterizing this as a case of “first impression.” *See* Brief for Appellant, No. ED81218, p. 23. Those cases have limited the landowner’s recovery to attorneys’ fees and litigation costs and have required a showing of direct causation by the condemnor. Indeed, in the *Nifong* case, 40 S.W.2d at 524 — quoted at length in *CC IV*, 998 S.W.2d at 38 — the court authorized recovery only where the condemnor “entails expense upon the proprietor” and allowed reimbursement of “actual losses inflicted on the land-owner” by the condemnor.

Hence, only direct losses caused by the condemnation itself are compensable, as distinguished from the incidental, consequential — and in some cases voluntary — expenditures claimed by 66. As discussed previously, none of the authorities cited in *CC IV* authorized or contemplated recovery of “carrying costs,” “sunk costs,” mortgage interest, real estate taxes, or any other type of tort-based damages. The only expenses at issue in those cases were attorneys’ fees and litigation costs incurred in the defense of the underlying condemnation action. That is consistent with the rule that “[p]roof of damages [must] be the natural and proximate consequence of the wrongful act,” *Lewis v. Hubert*, 532 S.W.2d 860, 869 (Mo. App. 1975), and that “the cause of the

damage must be shown with reasonable certainty.” *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 552 (Mo. App. 1973).

Plaintiff’s reliance on dicta from so-called “condemnation blight” cases (Br. 47) is unavailing. The short answer, of course, is that this is not a case of condemnation blight but one based on the lawful abandonment of a condemnation action. In fact, this case is the obverse of condemnation blight. Condemnation blight of the kind discussed in *State ex rel. Washington Univ. Med. Ctr. Redev. Corp. v. Gaertner*, 626 S.W.2d 373 (Mo. banc 1982), occurs when the announcement of and/or pendency of a condemnation action adversely affects the desirability of the property, including the owner’s ability to rent or use it during the condemnation. The result is a potential decrease in the value of the property and in its ability to generate income.

By contrast, the undisputed evidence here shows that the overall value of the Property — as well as 66’s income from drive-in operations — significantly *increased* during the pendency of the condemnation. Accordingly, the dicta in cases such as *Gaertner* have no relevance.

Thus, even if plaintiff’s alleged incidental and consequential “damages” were considered a tangential, collateral consequence of a perfectly legal act, they are, at most, *damnum absque injuria*. *Hamer*, 304 S.W.2d at 873.

**C. Plaintiff Cannot Recover Real Estate Taxes.**

The trial court awarded 66 the sum of \$90,058 to reimburse it for real estate taxes paid during the condemnation period. 66 does not challenge the adequacy of that award on its appeal, but we submit that these “damages” are outside the scope of

recoverable expenditures under Missouri law and that this assessment should be set aside. The only justification advanced by 66 in support of its claim for property taxes was that the condemnation action supposedly prevented it from selling the Property and caused it to have to pay real estate taxes. This is simply wrong both legally and factually. As stated boldly in *Nichols*, § 26D.01[6], p. 26D-71 (3d rev. ed. 2002): “The commencement of the condemnation proceedings does not impose any legal restriction on the property. The owner can sell it . . .,” citing, *inter alia*, *State ex rel. Highway Comm’n v. Armacost Motors, Inc.*, 552 S.W.2d 360 (Mo. App. 1972), and *Kansas City v. Boruff*, 243 S.W. 167 (Mo. 1922). Indeed, in *Armacost Motors*, 552 S.W.2d at 365-66, the court acknowledged that the proposed condemnation of property often spurs the emergence of speculative buyers. Here plaintiff itself had purchased the fee interest in the Property after the City had already blighted it and raised the spectre of condemnation.

Plaintiff’s chief financial officer essentially acknowledged that 66 could have sold the Property during the pendency of the condemnation action, but that Krueger, its chief executive officer, was unwilling to do so because he wanted more money (L.F. 127-28). The only competent testimony in the record showed that 66’s inability to close on its contract with Crestwood Festival was caused not by the condemnation, but by the faltering finances of Crestwood Festival’s principal (Tr. 196). Why else would Crestwood Festival negotiate eleven separate contract extensions and fork over \$182,054 in contract extension payments during the condemnation period? In short, the evidence demonstrated that the condemnation proceedings did not prevent 66 from selling its Property and, therefore, did not cause it to incur any additional payments of property

taxes or anything else. Plaintiff's recurring mantra that its assets were "tied up" and that the condemnation "blocked the sale" of the Property (Br. 18, 19, 20, 25, 44, 46, 61) is utterly specious.

The trial court's decision to allow 66 to recover property tax payments is also off-base for a second, independent reason. A landowner is not "damaged" by having to pay real estate taxes. Such taxes are a concomitant of property ownership imposed by law, and are a *quid pro quo* for the governmental services provided to the Property. In no sense do they constitute a "loss." Plaintiff had the full use of the Property during the pendency of the action and continued to utilize it for the same purpose as in the 46 years prior to the abandonment. It was thus required by law — not by the condemnation — to pay real estate taxes, thereby maintaining a lien-free title while the Property appreciated in value. In return, it became entitled to the state, county, and municipal services funded by those tax revenues, including fire and police protection for the drive-in. 66's chief financial officer acknowledged that payment of real estate taxes is an ordinary and necessary expense of operating a drive-in theater, which 66 continued to do before, during, and after the pendency of the condemnation (L.F. 138-39).

Plaintiff cites no authority from any jurisdiction categorizing real estate taxes as damages caused by a condemnation or authorizing their recovery following abandonment of the condemnation, whether or not the abandonment was authorized by statute. That is because, according to our research, there is no such authority anywhere. On the contrary, in apparently the only case where the issue was even raised, it was held that a statute providing indemnity for loss or expense incurred in abandoned proceedings

did not cover the inability to sell the property or the recovery of taxes paid on the property proposed to be taken. *Munroe v. City of Woburn*, 220 Mass. 116, 107 N.E. 413 (1915).

Plaintiff's claim for recoupment of property taxes is as unprecedented as it is unsupportable. Even under the most expansive reading of Missouri's unique common-law, a landowner is entitled only to recovery of losses "entailed" by the condemnation. *Nifong*, 40 S.W. at 524, quoted in *CC IV* 998 S.W.2d at 38. While the condemnation may have caused 66 to hire attorneys, it did not cause 66 to pay property taxes. The trial court's award of \$90,058 for real estate taxes should be reversed.<sup>14/</sup>

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<sup>14/</sup> Even if, *arguendo*, real estate taxes were properly recoverable, the trial court erred in determining that 66 had a loss in that amount from drive-in operations because it excluded from its calculations the \$182,054 contract extension payments, which should have been offset against taxes as it was against mortgage interest.

**IV. THE TRIAL COURT ERRED IN ALLOWING 66 TO RECOVER ALL ITS CLAIMED ATTORNEYS FEES ALLEGEDLY RELATED TO THE DEFENSE OF THE CONDEMNATION ACTION BECAUSE PLAINTIFF FAILED TO SUSTAIN ITS BURDEN TO SHOW THAT THOSE FEES WERE REASONABLE AND NECESSARY TO THE DEFENSE OF THE CONDEMNATION ACTION IN THAT THE CLAIM FOR FEES WAS INADEQUATELY DOCUMENTED AND PLAINLY INCLUDED FEES PAID FOR OTHER MATTERS, AND PLAINTIFF'S "EXPERT TESTIMONY" LACKED FOUNDATION AND COULD NOT CURE THE DEFECTS IN ITS PROOF.**

Plaintiff chose to submit its claim for attorneys' fees in the condemnation action — the only claim properly pleaded in the second amended petition — without any testimony by the lawyers who performed the services and with only the flimsiest documentation from time records and actual bills. For the vast majority of the fees sought, there simply was no documentation presented. The trial court essentially “rubber-stamped” 66’s request for condemnation-case fees in its entirety, based on plaintiff’s supposed “expert” testimony. It did so despite uncontroverted evidence — including deposition testimony from one of 66’s own attorneys — which showed that many of the fees sought were not related to the condemnation action or were otherwise not recoverable.

Plaintiff requested reimbursement of fees and expenses paid to the following lawyers and court reporters:

Daniel Rabbitt	\$107,037
Nations & Mueller	\$170,689
Court Reporters	<u>\$ 1,085</u>
Total:	\$278,811 (Pl. Ex. 2)

66 bore the burden of showing the amount of fees incurred in connection with the abandoned condemnation action, their reasonableness and necessity. *Hester v. American Family Mut. Ins. Co.*, 733 S.W.2d 1, 3 (Mo. App. 1987). Adequate documentation of such claims is critical because the trial court must “consider the time spent, nature and character of services rendered, nature and importance of the subject matter, degree of responsibility imposed on the attorney, value of property or money involved, degree of professional ability required and the result.” *Manfield v. Auditorium Bar & Grill, Inc.*, 965 S.W.2d 262, 268 (Mo. App. 1998) (remanding lower court’s award of attorneys’ fees, because the award was unsupported by the record). Although a trial judge generally is considered to be an expert on the issue of attorneys’ fees, a fee award must be supported by competent and substantial evidence. *Tepper v. Tepper*, 763 S.W.2d 726 (Mo. App. 1989) (reversing award of attorneys’ fees where there was no evidence of the hourly rate charged, the amount of work done, or the amount of work needed to be done). Here, the deficiencies in 66’s proof left the trial court no way to determine the

proper amount of fees. This does not satisfy 66's burden of proof and renders the court's judgment infirm.<sup>15/</sup>

66's attorney of record in the condemnation action was Daniel Rabbitt, initially with Brown, James & Rabbitt and later with Rabbitt, Pitzer & Snodgrass. Although defendants did not challenge 66's basic entitlement to recover fees paid to Rabbitt in connection with the defense of the condemnation action, there was no way for the trial court to determine the amount of those fees because 66 did not introduce all of Rabbitt's fee statements. In addition, many of the statements that are in the record relate to Rabbitt's defense of Crestwood Festival in a separate declaratory judgment action, rather than the defense of 66 in the condemnation case (Tr. 41-48). Since those fees were incurred in an entirely separate litigation matter, they are not recoverable.

The more than \$170,000 in fees which 66 allegedly paid to the Nations & Mueller law firm are even more problematic. Nations & Mueller did not enter an appearance in the condemnation action, and 66 did not present evidence regarding the role that attorneys from that firm played, if any, in connection with the condemnation

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<sup>15/</sup> The general rule that the trial judge is an expert on the issue of attorneys' fees presumes that the judge personally tried the case for which the fees are sought and is acquainted with all the issues involved in the case. *Tate v. Golden Rule Ins. Co.*, 859 S.W.2d 831, 835 (Mo. App. 1993). Here, of course, Judge Wallace did not handle the condemnation matter.

proceeding. Nations & Mueller acted as general counsel to 66 and many other companies in the Wehrenberg Theatre corporate empire relating to a variety of legal matters. It sent combined fee statements regarding all of its services which did not separately itemize charges relating to defense of the condemnation action, if any, from (1) charges incurred in connection with general corporate representation of 66; (2) representation of Crestwood Festival in the declaratory judgment action; or (3) 66's efforts to develop the Property on its own (charges which 66 previously categorized as so-called "sunk costs"). *See* Def't Ex. C. Plaintiff's expert testified that he had reviewed the fee statements and had discussed them with attorney Terrence Mueller, but without testimony from the lawyers who did the work or detailed statements showing what was done, there was no way for defendants or the court to verify the nature of the services performed or to determine whether they were related to the condemnation action.

Both the trial court and plaintiff's expert blithely ignored substantial evidence showing that many of the charges for Nations & Mueller's services were entirely unrelated to 66's defense of the condemnation case. Based on the deposition testimony of Terrence Mueller and the few fee statements that were available, it appears that Nations & Mueller's primary role was to represent 66 in its attempts to develop the Property, rather than in the condemnation proceedings. In fact, evidence including 66's own interrogatory answers (L.F. 104-13) showed that nearly \$100,000 of the fees paid to Nations & Mueller were for legal services performed during a period in which there was *no activity at all in the condemnation litigation* (Tr. 67-73). The only legal expenses which 66 would have incurred during that time period related not to the defense of the

condemnation action, but to its own efforts to develop the Property with Crestwood Festival.<sup>16/</sup>

Furthermore, 66's own interrogatory answer admitted that "some of these expenses [i.e., the Nations & Mueller legal fees] are claimable in damages as sunk development costs" relating to its efforts to develop the Property on its own. (*See* Tr. 107-08). Although the trial court had already ruled that 66's "sunk costs" were not recoverable, neither 66 nor the trial court made any attempt to carve out of the attorneys' fee claim those fees which 66 itself characterized as "sunk costs," rather than costs of defending the condemnation action.

Plaintiff could not cure these defects in its proof by wrapping everything in a cloak of "expert testimony" from Attorney Seigel. The lack of proper documentation regarding 66's attorneys' fees claims renders Seigel's testimony mere speculation and conjecture. Expert testimony must be based on facts and adequate data, and cannot rest

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<sup>16/</sup> This period was from October 18, 1989 (when Judge Campbell entered his order denying Crestwood Commons the right to condemn the Property) to October 15, 1990 (when Crestwood Commons filed its opening brief in the appeal from Judge Campbell's order) while the condemnation case was in the Court of Appeals. During that time-frame, there was no activity in the trial court and no significant work on the condemnation case; 66's attorneys were merely waiting for Crestwood Commons' opening brief in the appeal (Tr. 72). Yet the court allowed almost \$100,000 in fees for work in that period.

on mere guess or conjecture. *Gaddy v. Skelly Oil Co.*, 259 S.W.2d 844, 848-49 (Mo. 1953); *Mueller v. Bauer*, 54 S.W.3d 652, 658 (Mo. App. 2001). Lack of adequate documentation may render an expert's opinion speculative. *Id.* at 658. As the Court of Appeals perceptively noted, Seigel's testimony was not based on an independent analysis of the facts but only on the conclusions of 66's lawyers. This was a foundational, not a credibility issue, and his legal conclusion invaded the province of the court (A-27).

In addition, Seigel's blanket opinion that all of the fees claimed are reasonable rests upon factual assumptions which are demonstrably false, because it is contradicted by testimony in the record from Mueller, one of the lawyers who performed the services. Expert opinions based on false factual assumptions have no evidentiary value. *State ex rel. Missouri Highway & Transp. Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642 (Mo. App. 1992). Remarkably, Seigel testified that he did not exclude any items from 66's attorneys' fee claim. Yet, Mueller admitted that 66's claim included a number of items which were clearly improper. For example, he conceded that there were a number of time entries where the only description in the time records was "phoned Mr. Krueger" and that he was unable to allocate those time entries to the defense of the condemnation action (L.F. 45-47). The fees for those time entries were nevertheless included in 66's claim.

Mueller further acknowledged that a number of other time entries should not be included in the fee claim in this case. He reluctantly conceded that a \$500 time

entry by Gus Nations for “miscellaneous phone, trip to drive-in to inspect perimeter” on a fee statement dated 8/3/89 may not properly have been allocated to the lawsuit (L.F. 46). Mueller agreed that there were inconsistencies in the time records, such as an entry he made on 8/29/90 for an office conference with Nations where there was no corresponding entry for that conference by Nations (L.F. 48-49). He also admitted that there were time entries by Nations which obviously had nothing to do with this case, including one for a telephone conference with Krueger about the “Lemon Law” (L.F. 49). When asked about another time entry by Nations for \$1,150 where the only service described was “phone RPK [i.e., Ronald P. Krueger] Re: service” pertaining to a Trammell Crow declaratory judgment matter, Mueller’s only explanation about how one could determine the reasonableness of that entry was “you can take my word for it” (L.F. 50).

Indeed, this invocation of *ipse dixit* typifies 66’s approach to its claim for attorneys’ fees in this case, and particularly the payments to Nations & Mueller. The amount of its fee claim has been a moving target from the beginning, and when pressed for proof that the fees in question were actually related to the defense of the condemnation action, 66’s only consistent response has been “you can take my word for it.” That won’t do the job. Under Missouri law, even when an attorney supports a fee claim with detailed time records, the “trial court should carefully consider any time records which do not contain some explanation of the services rendered in determining the reasonable value of the attorneys’ services.” *Kansas City Area Transp. Auth. v. 4550 Main Assocs.*, 893 S.W.2d 861, 871 (Mo. App. 1995); *see also Meyer v. McGarvie*, 856 S.W.2d 904, 908 (Mo. App. 1993) (upholding reduction in fee award where many of the

fees charged were not substantiated). Attorneys' fee claims that include items which on their face are "clearly unreasonable and excessive" must be reduced. *Tate v. Golden Rule Ins. Co.*, 859 S.W.2d at 835.

At bottom, the trial court's wholesale endorsement of plaintiffs' fee application unquestionably compensated 66 for expenditures that are not recoverable. At a minimum, as held by the Court of Appeals, this issue should be remanded to the trial court with instructions to insist on proper proof and to separate the compensable wheat from the uncompensable chaff by disallowing Nations & Mueller's fees, the fees of Dan Rabbitt in the Crestwood Festival matter, and any other fees that are not adequately documented.

**V. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS/CROSS-APPELLANTS A COMPLETE SET-OFF FOR THEIR PAYMENT OF THE PRIOR JUDGMENT OBTAINED BY 66 PURSUANT TO § 523.045 RSMO., BECAUSE 66 WAS THEREBY ALLOWED A WINDFALL DOUBLE RECOVERY IN VIOLATION OF THIS COURT'S MANDATE, IN THAT THE PRIOR AWARD CONSISTED OF ATTORNEYS' FEES THAT WERE ALSO INCLUDED IN THE PRESENT JUDGMENT.**

This Court specifically directed "the trial court, upon remand, to avoid duplicative recovery if damages claimed in the wrongful abandonment claim overlap the interest award provided by section 523.045." *CC IV*, 998 S.W.2d at 40. Defendants paid \$391,912.36 (\$250,582.55 principal plus interest) to 66 on the interest judgment

previously obtained pursuant to § 523.045 (L.F. 73). Although the trial court allowed defendants a limited setoff in the amount of \$112,764 (or 45% of the principal amount of the judgment), it erred by refusing to allow a complete setoff and miscalculated the setoff it ordered.

The purpose for a discretionary award of interest under § 523.045 was recently explained as follows: “Section 523.045 recognizes the possibility of an invasion or appropriation of a valuable property right and gives the trial court the authority to look at the nature of that invasion on a case by case basis and, in its discretion, award interest if the landowner has been practically deprived of proprietary rights.” *City of Cottleville v. American Topsoil, Inc.*, 998 S.W.2d 114 (Mo. App. 1999). Thus, §523.045 permits the trial court in a condemnation action to fashion an award of discretionary interest to compensate a landowner for loss, inconvenience, and/or damages resulting from the abandonment of a condemnation action.

66 sought the maximum amount of interest allowable under § 523.045 and presented evidence of its alleged damages, which included attorneys’ fees and interest on a promissory note relative to the General Cinema transaction. At that hearing, Krueger testified as follows:

“Q. On July 10, 1992 did Crestwood Commons file an election to abandon the condemnation proceeding?

“A. Yes sir.

“Q. In that interim between December 16, 1991 and July 10, 1992, did you incur expenses both on your promissory note and also for

legal fees and other expenses that you would not have incurred but for the pendency of the condemnation proceeding?

“A. Yes sir” (L.F. 168-72).

As a result of this testimony, the court awarded the full amount of interest it could possibly award pursuant to § 523.045 — six percent times the amount of the commissioners’ award for the 206 days between the award and the abandonment.

Defendants maintained below that the entire principal amount of the § 523.045 award (\$250,586) should be offset against the attorneys’ fees sought here for defense of the condemnation action. That is because 66 was never deprived of the use of its property, and the only properly-considered element of the damages awarded in the earlier proceeding was attorneys’ fees for defending the condemnation, inasmuch as the “promissory note” referred to by Krueger related to a non-compensable matter (the purchase of General Cinema).

The trial court, however, rejected the concept of a total setoff and allowed defendants an offset of only 45% of the § 523.045 judgment — or \$112,764. The court reasoned that if 66 had had the use of the award moneys, it could have applied them to the payment of its attorneys’ fees, and thus found an overlap to that extent — as directed by this Court. The court’s methodology, though, was flawed by some double-counting. The court took note that at the 1993 hearing under § 523.045, 66 claimed \$340,000 in legal fees, other expenses, and payments on the promissory note. The court also observed that the legal fees testified to in the present case were \$278,111. Without realizing that these fees were the same ones that were included in the 1993 claim, the

court added the two claims together and determined that the attorneys' fees constituted only 45% of 66's overall damages (278,811/618,811) when the proper calculation would have shown 82% (278,811/340,000).

Thus, even assuming, *arguendo*, that our other arguments relating to the attorneys' fee are rejected, a correct application of the trial court's approach entitles defendants to a setoff of 82% of the 1993 judgment, or \$205,480, against whatever sums might be found owing in this case.<sup>17/</sup>

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<sup>17/</sup> Alternatively, if this court agrees with the Court of Appeals that the § 523.045 award covered loss of use of the Property and other expenses excluding attorneys' fees, and that the present action allows recovery only of attorneys' fees — an analysis with which we agree — then we acknowledge that no setoff is required, as the Court of Appeals held.

## **BRIEF AS RESPONDENTS**

### **Introduction**

The substitute brief filed by 66 as appellant in this Court depends entirely on the already-debunked notions that this is a tort-type case and that a condemnee is entitled to be made whole for every nickel expended in the context of a condemnation abandonment. As discussed above in Point III, this argument is devoid of support in Missouri law or elsewhere and ignores the fact that a condemnor has a statutorily-protected right to abandon a condemnation. Moreover, as the facts of this case graphically reveal, acceptance of plaintiff's kitchen-sink approach to damages would open Pandora's box and immerse the courts in a morass of complex financial analyses and vexing issues of causation. Indeed, this never-ending case is Exhibit A, and is a testament to the wisdom of a bright-line rule limiting abandonment damages to litigation-connected expenses.

We will not reiterate our discussion of the various shortcomings in the premises underlying plaintiff's approach to this case, but instead merely incorporate by reference our Points I and III as a complete response to Points I and II in appellant's substitute brief. We respectfully encourage the Court to adopt the scholarly approach of Judge Crane's opinion for a unanimous panel of the Court of Appeals. We will, however, briefly discuss additional bases for rejecting appellant's request for an even greater windfall than it has already pocketed.

**VI. THE TRIAL COURT DID NOT ERR IN DISALLOWING RECOVERY TO PLAINTIFF FOR MORTGAGE INTEREST PAYMENTS MADE TO PLAINTIFF'S LENDER. (Response to Points I and III of Appellant's Substitute Brief.)**

Apart from the dearth of authority supporting 66's request for mortgage payment reimbursement, its tort-based argument is also doomed by its reliance on the untenable proposition that the Property could not be sold while the condemnation was pending. Plaintiff itself purchased the fee knowing that condemnation was imminent, consistent with the fairly common practice of speculators buying up land in areas targeted for redevelopment, hoping to hit the jackpot with the condemnation commissioners or a jury. *See Armacost Motors*, 552 S.W.2d at 365-66. Plaintiff had full use of the Property for the entire period. Crestwood Festival's enthusiasm was not dampened by condemnation, as evidenced by its substantial payments made to keep open its option to buy. The only reason the Property did not sell before it did was Ron Krueger's lust for an even bigger payday and Crestwood Festival's deteriorating financial picture.

It is undoubtedly true (though not verifiable) that many, if not most, of the properties that have been the subject of condemnation abandonments through the years have been encumbered by mortgages or deeds of trust. Yet apparently no previous condemnee has had the temerity to urge that mortgage interest payments were caused by the condemnation. Plaintiff has certainly cited no such case. The reason is obvious, for to state the proposition is to refute it. Just as taxes are not "damages" caused by the condemnation, neither is mortgage interest. The interest was paid to the bank for use of

the bank's money in accordance with the mortgage agreement pursuant to which the bank loaned money to 66 to buy the property in the first place. By making the required monthly payments, 66 avoided default in its obligation to the bank and kept its title clear while the Property continued to increase in value to the appreciated level at which it was ultimately sold — to the benefit of 66.<sup>18/</sup>

Even if mortgage interest were arguably recoverable, the trial court did not abuse its equitable discretion in limiting the recovery to the period before the existing mortgage was paid off and retired in November 1989 in connection with the refinancing to pay for the purchase of General Cinema by one of 66's sister corporations. The court reasonably found that financing to be even further removed from the chain of causation, and that finding is entitled to deference here. *Kassebaum v. Kassebaum*, 42 S.W.3d 685, 692 (Mo. App. 2001); *Mullenix-St. Charles Props.. L P. v. City of St. Charles*, 983 S.W.2d 550, 555 (Mo. App. 1998). Nor can the court be criticized for setting off the \$182,054 received from Crestwood Festival, as the receipt of that income was a direct result of plaintiffs *not* having sold the property in September 1989. The court correctly held that plaintiff cannot have it both ways. Thus, the trial court's bottom-line disallowance of any recovery for mortgage interest should be affirmed.

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<sup>18/</sup> The boundless expanse of the radical new law advocated by plaintiff is vividly exemplified by its claim not only for interest paid on the mortgage on the land subject to the condemnation but further for interest paid by a sister corporation to finance the acquisition of General Cinema (Br. 58-61).

**VII. THE TRIAL COURT DID NOT ERR IN DISALLOWING 66’S CLAIM FOR “SUNK COSTS” OF \$60,000 INCURRED BEFORE THE CONDEMNATION IN BUYING OUT THE LEASEHOLD INTEREST OF ONE OF ITS TENANTS. (Response to Point II of Appellant’s Substitute Brief.)**

At the summary judgment stage, 66 asked the trial court to award a total of \$98,594 in so-called “sunk costs”— which it defined as “costs incurred toward the development by 66, Inc. of the property” (L.F. 119, 179). All of these costs were incurred prior to Crestwood Commons’ initiation of the condemnation proceeding, in anticipation of 66’s effort to sell the Property to Crestwood Festival or another developer other than Crestwood Commons (L.F. 119). Even if the condemnation had not been abandoned, 66 would have incurred the same expenses. The trial court’s summary judgment order correctly sank 66’s claim for “sunk costs” because those expenditures were not caused by the condemnation or abandonment, were wrapped into the amounts which Crestwood Festival and other potential buyers were willing to pay for the Property during and after the condemnation, and ultimately were recovered in the proceeds which 66 received for the sale of the Property in 1993.

In this Court, 66 limits its claim for “sunk costs” to its voluntary decision to pay \$60,000 to Emmis Broadcasting to terminate a lease on part of the Property relating to a broadcast antenna to make the Property more attractive to its preferred developer (L.F. 120). This expenditure was incurred not because of the condemnation action — which had not yet been filed — and not because of any act or omission by any of the

defendants, but simply because 66 wanted Crestwood Festival — an entity in which it had an equity interest — to develop the property. The fact that Crestwood Commons later instituted condemnation proceedings did not impose any legal obstacle on 66's ability to sell the property, and did not cause the expenditure or cause it to be "wasted." The trial court correctly recognized that there was an insurmountable causal chasm between 66's voluntary purchase of the Emmis leasehold and the subsequent abandonment of the condemnation. That compelling factual finding is entitled to deference. Furthermore, as the trial court observed, the absence of a leasehold on the Property was reflected in the purchase price offered originally by Crestwood Festival and ultimately by National Super Markets.

Like its other claims for incidental damages, 66's attempt to recover for "sunk costs" is without precedent and disregards the ample profit 66 made on this deal. It also mangles the principles of cause and effect. The trial court should be affirmed on this point.

**VIII. THE TRIAL COURT PROPERLY FOLLOWED THIS COURT'S MANDATE IN OFFSETTING THAT PORTION OF THE CURRENT AWARD THAT OVERLAPPED THE PREVIOUS AWARD IN THE § 523.045 PROCEEDING, THOUGH IT ERRED IN CALCULATING THE EXTENT OF THAT OVERLAP. (Response to Point IV of Appellant's Substitute Brief.)**

In Point V, *ante*, we demonstrated why the trial court should have allowed a setoff for the entire \$250,582 of the 1993 judgment awarded under § 523.045 because

the only allowable item included in that judgment was a claim for attorneys' fees incurred in the condemnation action. Since that claim is duplicative of the fees sought (and awarded) here, the present judgment — or any amended judgment entered on remand — should be reduced by \$250,582 to comply with this Court's mandate.

66 challenges the trial court's setoff of \$112,764 (or 45% of the \$ 523.045 judgment). The finding of overlap to that extent is a finding of fact to which this Court owes deference. *Kassebaum*, 42 S.W.3d at 692; *Mullenix*, 983 S.W.2d at 555. 66's argument that there is no overlap not only discounts the trial court's finding but conflicts with this Court's earlier holding in this case which expressly anticipated an overlap and ordered *the trial court* to deal with it.

As we pointed out in Point V, the trial court was correct in ordering a setoff but misapplied its own methodology in calculating the extent of the setoff. We have nothing further to add to our discussion in Point V.

**IX. THE TRIAL COURT CORRECTLY RULED THAT 66 WAS NOT ENTITLED TO PREJUDGMENT INTEREST. (Response to Point V of Appellant's Substitute Brief.)**

The trial court granted summary judgment against 66 on its claim for more than \$2.3 million in prejudgment interest on its alleged "carrying costs," "sunk costs," and legal expenses allegedly incurred in defending the condemnation proceeding (L.F. 235). Even assuming 66 established entitlement to any other damages, it fell woefully short of satisfying the elements necessary for an award of prejudgment interest under

Missouri law. Moreover, plaintiff now acknowledges that its attorneys' fee claim is unliquidated, and thus it claims no prejudgment interest on whatever amount is eventually awarded for attorneys' fees in the condemnation case (Br. 77). Since, as we have explained and the Court of Appeals held, the *only* viable claim in this case is for attorneys' fees in that litigation, the Court need not address this issue.

66 made no attempt in its second amended petition (L.F. 10) to plead any facts that would support an award of prejudgment interest; indeed, it did not even include prejudgment interest in its prayer for relief. Furthermore, although the second amended petition and appellant's brief characterized 66's claim as a tort cause of action, 66 has made no attempt to comply with the demand requirement contained in § 408.040(2), which governs prejudgment interest in tort cases.

66 acknowledges (Br. 46) that it can recover prejudgment interest only if its damages are "liquidated" or "readily ascertainable." *City of St. Peters v. Hill*, 9 S.W.3d 652, 656 (Mo. App. 1999); *Schreibman v. Zanetti*, 909 S.W.2d 692, 704 (Mo. App. 1995); *Dierker Assocs., D.C., P.C. v. Gillis*, 859 S.W.2d 737, 746 (Mo. App. 1993). As explained in *Schreibman*, 909 S.W.2d at 704, when the parties do not agree as to the measure of damages, then the damages are not readily ascertainable and the court should refuse to impose prejudgment interest.

Even assuming there is some viability in 66's claims for incidental and consequential damages, those claims in this case are a textbook example of unliquidated damages. Far from being known and undisputed, the amount of 66's claimed damages has been a moving target from the very beginning. The only damages pleaded in the

second amended petition were for a “lost sales opportunity” estimated at \$2,500,000 and for legal fees incurred in defending the condemnation action, which were alleged to be in excess of \$150,000 (L.F. 10-15).

The unliquidated nature of 66’s damages claims is readily apparent from the frequency with which it has changed the types and amounts of damages claimed in interrogatory answers and deposition testimony provided in discovery (L.F. 118). Indeed, plaintiff’s Feb. 21, 2000, interrogatory answer set forth principal “damages” in the amount of \$3,288,381 (L.F. 104-12). That answer superseded the prior answer which was filed on December 10, 1997, and remained unsupplemented for more than two years, claiming entitlement to prejudgment interest based on a principal amount of \$2,819,955 in alleged “damages” (L.F. 118). Most significant, however, is 66’s previous answer to the same interrogatory, which was signed on October 29, 1996, and which set forth yet another principal amount of “damages” and made no reference whatsoever to prejudgment interest (L.F. 118).

Indeed, for more than five years commencing with the filing of this case on November 10, 1992, until the service of its second amended answer to defendants’ damages interrogatory on December 10, 1995, 66 made no attempt to claim that its damages were for a “liquidated” amount, or to allege even in conclusory fashion that it was entitled to prejudgment interest. Its multi-million dollar claim for prejudgment interest is yet another example of plaintiff’s avaricious overreaching.

Under these circumstances, Missouri courts have not hesitated to deny prejudgment interest “based, generally, on the idea that where the person liable does not

know the amount he owes he should not be considered in default because of failure to pay.” *Fohn v. Title Ins. Corp.*, 529 S.W.2d 1, 5 (Mo. banc 1975). *See also Wulfing v. Kansas City Southern Indus., Inc.*, 842 S.W.2d 133, 160 (Mo. App. 1992) (“Interest is not allowed on unliquidated damages or demands until the rendition of judgment because a debtor who does not know the amount owed should not be considered in default for failure to pay”); *Ritter Landscaping, Inc. v. Meeks*, 950 S.W.2d 495, 497 (Mo. App. 1997) (prejudgment interest not recoverable where there is “no readily ascertainable method by which defendant could be aware of the amount he owes”).

Because property taxes, mortgage interest, and “sunk costs” are not “losses” caused by the condemnation, plaintiff’s claim for prejudgment interest on those amounts is moot. Even assuming otherwise, since both liability and the nature and amount of 66’s claimed damages have been disputed from the start, there is no basis for any award of prejudgment interest in this case. Accordingly, the trial court properly granted summary judgment in favor of defendants on this issue.

### **CONCLUSION**

The Court should reverse the trial court’s judgment outright for the reasons stated in Point I. In the alternative, *arguendo*, the Court should (i) reverse the award of \$136,057 for attorney’s fees incurred in this case; (ii) reverse the award of \$90,058 for real estate taxes paid by plaintiff; (iii) reverse the award of attorney’s fees for services in the condemnation case and remand with instructions to disallow the fees of Nations and Mueller and delete other fees that were not properly incurred in the underlying litigation or which are not properly documented; (iv) reverse the trial court’s allowance of a setoff

of only 45% of the § 523.045 judgment with instructions to setoff the entire amount against any judgment that may remain in this case; and (v) affirm the balance of the trial court's judgment for the reasons stated in Points VI, VII, VIII, and IX. Alternatively, the Court should adopt the opinion of the Court of Appeals.

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January 30, 2004

### **CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Rule 84.06(b) of the Missouri Supreme Court Rules that the foregoing Brief for Respondents/Cross-Appellants complies with that Rule, and that it has 15,911 words, exclusive of the cover, certificate of service, this certificate and the signature block, as determined by the Microsoft XP word-counting system. I also certify that the diskettes of the brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

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Thomas C. Walsh